No. 98-0387

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The advertising ban challenged here is plainly invalid under *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), and *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). Pt. I. But the fact that the court below nevertheless felt at liberty to uphold the ban in reliance on *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986), illustrates the need for a clearer line to protect consumers and commerce from unconstitutional restrictions on commercial speech. Pt. II.

I. THE CHALLENGED REGULATORY SCHEME DOES NOT MEET THE CENTRAL HUDSON TEST.

The regulatory scheme at issue criminalizes the broadcast of truthful, non-misleading advertising of lawful games of chance. 18 U.S.C. § 1304; Gov. Br. 14. From this general prohibition, numerous exceptions have been carved, as the government concedes. Gov. Br. 43. For example, broadcast advertising is permitted in *every* state regarding:

1) Casinos on Indian lands. 25 U.S.C. § 2710(d).

2) Government casinos. 18 U.S.C. § 1307(a)(2).

3) Betting on horse races, dog races and jai alai. 28 U.S.C. § 3704(a)(4); *Elimination of Unnecessary Broadcast Regulation*, 56 Rad. Reg. 2d (P&F) 976 (1984) (*Broadcast*).

4) Poker tournaments. *Letter to Calnevar Broadcasting, Inc.*, 8 F.C.C.R. 32 (1992).

State lotteries may also be advertised in all 37 states that conduct lotteries. *See* 18 U.S.C. § 1307(a)(1); Wendy Melillo, *Lottery Ad Standards Urged*, Adweek (Mar. 22, 1999).

Even with respect to the gambling primarily covered by the ban, commercial casinos owned by private companies, the law does not ban all advertising. In *every* state, these casinos may advertise that they provide "Vegas-style excitement," if they are a multi-use establishment. *In re WTMJ*, Inc., 8 F.C.C.R. 4354

(1993). And they may include the word "casino" if it is in the establishment's name, even though the government recognizes this is promotional advertising. *Letter to DR Partners*, 8 F.C.C.R. 44, 44 (1992). These casinos may not, however, advertise which games they offer or their payouts, information potential customers could use to choose among casinos.

Despite the government's effort to identify interests to justify these Swiss cheese rules, the "overall irrationality of the Government's regulatory scheme" undermines every interest the government claims. *Coors*, 514 U.S. at 488. Further, the government impermissibly chose to ban speech, without even considering the numerous direct regulations that would as effectively advance its interests as the First Amendment requires. *See Coors*, 514 U.S. at 491.[1]

A. The Government Has Not Shown, and Cannot Show, That Its Regulatory Scheme Advances Its Asserted Interests to a Material Degree.

1. The scheme does not materially assist states that prohibit gambling. The government's claim that its scheme helps states that prohibit gambling protect their own residents by preventing broadcast advertising "spillover" from stations licensed elsewhere, Gov. Br. 29, is fatally undermined by the advertising it permits. For example, the government has not protected states from spillover of state lottery advertising, which it permits to spill over from any of the 37 states that conduct lotteries. The government has also not "assisted" any

[1] Contrary to the government's suggestion, the scheme challenged here has not been reviewed, much less upheld, by this Court. The only lower court to uphold it is the court below. *Cf. Valley Broad. Co. v. United States*, 107 F.3d 1328 (9th Cir. 1997) (holding ban invalid), *cert. denied*, 118 S. Ct. 1050 (1998); *Players Int'l, Inc. v. United States*, 988 F. Supp. 497 (D.N.J. 1997) (same), *cert. denied*, 119 S. Ct. 852 (1999).

states to shield their residents from advertising for betting on horses, or jai alai, or poker tournaments, or gambling operated by charities or as commercial promotions. To the contrary, the government permits advertising for these types of gambling to be broadcast both as spillover from other states and from *inside the states alleged to need help protecting residents from such speech*. Moreover, the number of states that may want such assistance has dwindled almost to nothing. Only two states have not legalized some form of gambling. Deirdre Shesgreen, *Stacked Deck*, Legal Times 1, 4 (Mar. 29, 1999).

The government's attempt to avoid these devastating facts by recharacterizing its interest as assisting states that prohibit *casino* gambling, Gov. Br. 28, is equally flawed. The statutory scheme *permits* broadcast advertising for casino gambling, not only from other states, but from *inside* the very states the government purports to assist -- if the advertised casino is controlled by a government entity or Indian tribe. Thus, Delaware, Rhode Island, West Virginia, and South Dakota may advertise their video poker, blackjack, keno and other casino-type games on any station in the country. *See* W. Va. Code § 29-22A-4 (1998); R.I. Gen. Laws § 42-61.2-2(a) (1998); Del. Code Ann. tit. 29, §§ 4801, 4820 (1998); S.D. Codified Laws § 42-7A-4 (1998). The "assistance" provided to states that prohibit *all* types of gambling is to permit advertising about these slot machines, video black jack and other casino-type games to be broadcast to their residents, without restriction.

Likewise, casinos operated on Indian land may advertise in *every* state, regardless of the state's policies on casino or any other type of gambling. This is a huge "exception." In 1997, there were 115 tribes with at least one casino operation each. <www.dgsys.com/~niga/stats.html>. Those known to advertise on television and radio included casinos near Phoenix, Portland, Minneapolis, Sacramento, Albuquerque and in New York State

and Connecticut. Gov. Lodging 435-37. Thus in Texas, the very state the court below "protected" from spillover advertising, Pet. App. 10a, federal law permits the Speaking Rock Casino near El Paso, and Indian casinos in Louisiana and other states, to advertise from stations inside Texas itself.[2]

Indeed, the government has aggressively forced states to accept the operation and advertising of Indian casinos within their own borders, which "makes no rational sense if the Government's true aim is to" assist anti-gambling states to protect their residents from such gambling. *Coors*, 514 U.S. at 488. The Indian Gaming Regulatory Act (IGRA), enacted not only to regulate but also to *promote* the development of Indian casinos, requires states to permit Indian casinos if they permit any casino-type gambling for any purpose by any person. 25 U.S.C. § 2710(d)(1)(B).[3] The federal government has forced anti-gambling states that permit occasional "casino night" charity functions to accept Indian commercial casinos within their boundaries, advertising to their residents -- as well as advertising by Indian casinos operating in other states. Even in North Carolina, the state protected in *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), from in-state advertising of Virginia's lottery, the casino Harrah's operates on Indian land in North Carolina may freely advertise from in-state stations. <www.harrahs.com/tour/tour_index.html>.

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[2] Federal law also permits Texas' racetracks to advertise their horse or dog racing, simulcast wagering, and wagering windows. Texas has seven horse racetracks and three dog tracks. *See* <txrc6.txrc.state.tx.us/tracks.html>. All web sites cited in this brief were visited March 28-31, 1999.

[3] The federal law that excepted Indian casinos from the advertising ban, also "authorized casino gaming on Native American lands in approximately 31 states." Eugene M. Christiansen, *Gambling and the American Economy*, 556 Annals Am. Acad. Polit. & Soc. Sci. 36, 38 (1998) (*Christiansen*).

These contradictory provisions ensure "[t]here is little chance [the scheme] can directly and materially advance its aim" of helping states keep their residents ignorant of casino gambling. *Coors*, 514 U.S. at 489.

2. The scheme cannot materially reduce any social costs of gambling. The government also claims that its prohibition reduces social costs of gambling, Gov. Br. 31, but that claim is similarly unpersuasive and is completely undermined by the regulatory scheme's massive contradictions. For example, the materials submitted by the government regarding compulsive gambling emphasize that what attracts compulsive gamblers and others is the excitement generated by casinos. *See, e.g.*, Gov. Lodging 399-400 ("Casino addicts . . . are attracted to the fantasy atmosphere, the excitement, the special treatment, and the incentives offered"); *id.* at 236 ("[e]xcitement plays a large role in motivating people to gamble"). Yet private casinos are *permitted* to advertise these very qualities. Advertising may associate the word "casino," if (as is common) it is in the advertiser's proper name, with fantasy atmosphere, excitement, special treatment and incentives such as shows, drinks, food, and luxury hotel rooms. *See In re WTMJ*, 8 F.C.C.R. at 4354. Casinos are even permitted to attract potential customers with such double entendre teasers as: "The odds for fun are high at Harrah's."[4]

"If combating [compulsive gambling] were the goal," one "would assume that Congress would regulate" the advertising

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[4] Another permitted commercial shows a man in an old chair, with a voice-over, saying: "The no-win vacation . . . [i]t's not happening here" and then switches to a happy crowd scene, with a voice-over saying: "It's happening at Harrah's. You can have a winning vacation here." Letter to Forbes W. Blair (Mass Media Bureau, Apr. 24, 1987) (explaining that § 1304 would not prohibit these broadcast spots) (attached to Gov. Mot. for Summ. J. below)(E.D. La., filed June 14, 1994).

most likely to attract such gamblers. *Coors*, 514 U.S. at 489. Instead, federal law *permits* that advertising, but prohibits advertising that could help those inclined to gamble make economically rational choices among potential vendors, such as advertising promoting more generous payouts than offered by competitors. Prohibiting this type of advertising just keeps all gamblers' costs higher by discouraging payout (*i.e.*, price) competition. The government makes *no* attempt to justify this inexplicable line.[5]

The government's regulatory scheme also permits advertising of most other types of gambling, including identical casino gaming operations controlled by a government or Indian tribe. *Cf. Coors*, 514 U.S. at 488. The government concedes that the same types of gambling are available at casinos that may advertise freely as at casinos that may not. Gov. Br. 38.[6]

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[5] What the government does try to justify is the broader ban on broadcast advertising than on print advertising, asserting that broadcast advertising presents a far greater danger of social costs. Gov. Br. 35. That assertion, however, is at odds with the provisions themselves, which impose ***harsher*** penalties for violating the ban on mailing print advertising (up to two years in prison for a first offense, up to five years for subsequent ones) than for violating the ban on broadcast advertising (one year maximum whether first or subsequent offense). *Compare* 18 U.S.C. § 1302 *with* § 1304.

[6] Thus, Delaware boasts of "the closest slot facility to the Delaware beaches . . . the most fun you've had since you were a kid," a "Las Vegas-style facility," the "thrill of over 1000 slot machines." *See* <www.doverdowns.com/slots> and <www.state.de.us/tourism/attrkent.htm>. West Virginia claims its "gaming rooms will electrify your sense of anticipation," "the action will accelerate and exhilarate you," that "winning is just a play away!" and that you will "find your fortune" by playing its gaming machines and betting on horse races. Players also receive free cocktails while playing the machines. *See* <www.ctownraces.com/slots/index.html>, <www.mtrgaming.com/gaming.html>, <www.wheelingdowns.com/slots.htm>. Maryland advertises its keno games as available "in many of your favorite social gathering spots -- restaurants, taverns, bowling alleys" and as "a fun, fast-paced game that can be enjoyed alone or with friends," with a new game available "every five minutes." *See* <www.msla.state.md.us/keno.html>. All these claims may also lawfully be made in broadcast advertising.

Moreover, no clear line exists between government or Indian casino gaming and private casinos even in terms of management or ownership. According to the Delaware Lottery, for example, the slot machines Delaware controls are not owned by the State; they are owned by slot machine vendors and *leased* to the State. Delaware, in turn, contracts with the *privately-owned* facilities where it places the slot machines, such as Harrington Raceway and Dover Downs, to actually operate and advertise the machines as the State's agents. Rhode Island undertook casino-type electronic gaming when its private racetracks were threatened by competition from racetracks and Indian casinos in other states. Had Rhode Island simply authorized those racetracks to offer video poker and slot machine games, imposing whatever regulations and tax it chose, the racetracks would have been prohibited by federal law from using broadcast advertisements to compete. Accordingly, the legislature authorized the state lottery commission to "provide" video gaming machines at those tracks. The private racetracks operate and advertise the gaming, and keep 31% of the revenue. *See* <www.trackinfo.com/li/li_hist.html>. Because Rhode Island could exercise the same control by regulation as it does by contract, the sharp distinction between gaming that is regulated by a state and gaming that is "conducted" by a state does not further the government's asserted interests.

Similarly, federal law does not require casinos on Indian lands to be operated by tribes. The same companies that operate private casinos may, under contract with a tribe, build, operate, and keep up to 30 to 40% of the net revenues of casinos on Indian land. 25 U.S.C. §§ 2710(d)(9), 2711(c). Harrah's, for example, a private casino company in Atlantic

City, Las Vegas and Reno, operates the Phoenix Ak-Chin casino and several others for tribes, and advertises them on television and radio. *See* <www.nigc.gov/contracts.html>; Gov. Lodging 435-36. The largest casino resorts in Louisiana, Grand Casino Avoyelles and Grand Casino Coushatta, are operated by a subsidiary of the world's largest private casino company, Park Place Entertainment. Because they are on Indian land, both can, and do, advertise on television and radio. *See* Gov. Lodging 435; Park Place Entertainment Corp. 8-K Filing (filed Feb. 5. 1999). These same companies, however, are prohibited from broadcasting even informational advertising about the identical gaming they operate on non-Indian land.

The government's attempt to justify the differential treatment of gaming activities that can and cannot be advertised on the ground that those banned from broadcast advertising impose greater social costs, is not even supported by the government's own "evidence," much less by common sense. For example, the government argues that state lotteries present little risk of infiltration by organized criminal groups, Gov. Br. 38, without even trying to reconcile this argument with the scheme's acceptance of horse and dog racing, even though these *have* in the past been associated with organized crime. Its sole explanation for why advertisements of horse racing are permitted, notwithstanding any social costs associated with "betting on the ponies," is that fewer people bet on races than go to casinos. *Id.* at 40. Yet, having suggested that the size of the audience is the defining issue, the government then provides no explanation for why advertising of the types of gaming that account for approximately 60% of the country's gambling revenues is permitted under the federal scheme. *See* Gov. Br. 40-41; *Christiansen* at 39.

The government's attempt to distinguish between permitted and prohibited advertising on the basis of a link between the

activity advertised and compulsive gambling is equally unpersuasive. The government suggests that state lotteries do not attract compulsive gamblers because they do not involve "continuous play" games. Gov. Br. 38. But the government's own materials contend there are state lottery addicts. *See* Gov. Lodging 399; *see also* Charles T. Clotfelter, *et al.*, Duke University Report to the National Gambling Impact Study Commission 16 (1999) (5% of state lottery players account for 54% of the nation's lottery sales). Further, the government's materials indicate that the aspects of state lotteries that attract lottery addicts are their low cost and easy access. Gov. Lodging 399. Yet the federal scheme permits state lotteries to advertise exactly these qualities -- regardless of the impact on compulsive gamblers. Other gaming the government finds to be associated with compulsive gambling may also be advertised on television and radio. *See* Gov. Lodging 283 (jai alai associated with increased incidence of Gamblers Anonymous chapters).[7]

In addition, the government has asserted other social costs of gambling that it neglects to mention in discussing state lotteries, possibly because lotteries are much more likely to entail those costs than is the gambling subject to the ban: *e.g.*, a regressive tax on the poor, and false but sometimes irresistible hope of financial advancement. Gov. Br. 15-16; Gov. Lodging 243 (study finding those in $15,000 to $30,000 income range constitute 66% of lottery players, 44% of bingo players, but only 24% of casino players).

Critically, the government is unable to point to *any*

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[7] The government's claim that lotteries cause less harm is also in tension with the provisions themselves. Congress imposed a *partial* ban on broadcast advertising of state *lotteries* -- advertising permitted only in states that conduct lotteries -- but *no* ban on broadcast advertising of state or Indian *casino* gaming. *Cf.* 18 U.S.C. § 1307(a)(1) and § 1307(a)(2). Thus, a state may advertise its own casino gaming in every state, but its lottery only in some.

distinction between the casinos that may freely advertise and those that may not that could justify the government's speech restriction. Its attempt to argue that Indian casinos impose lower social costs than private casinos is based solely on the existence of federal regulation and the location of Indian casinos in allegedly more remote areas. Gov. Br. 38. These factual claims are questionable, but more important, the argument misapplies the law. If, as the government suggests, social costs engendered by casino gambling can be lowered to an acceptable level with non-speech regulation, including regulation of the location of casinos, the existence of these effective non-speech alternatives *precludes* the government from imposing a ban on commercial speech.[8] *44 Liquormart*, 517 U.S. at 507 (Stevens, J.); *id.* at 529 (O'Connor, J.).

The government's reliance on *Edge* to save its Swiss cheese scheme is misplaced. The regulation upheld in *Edge*, despite its limited impact in the particular instance before the Court, was entirely consistent with the government's then-asserted interest in assisting states that conduct lotteries to promote them and assisting states that prohibit lotteries to prohibit advertising of lotteries within their borders. *See* 509 U.S. at 428 ("This congressional policy of balancing the interests of lottery and non-lottery States is the substantial

[8] As a factual matter, the government's intimation that private casinos are not heavily regulated is mistaken, and its assertion that private casinos are in big cities and Indian casinos are remote is open to dispute. South Dakota's private casinos, for example, are remote, and many Indian casinos are close to population centers. *See* Gov. Lodging 435-36. More to the point, casinos attract patrons from afar, a factor the government itself relied on in enacting the IGRA to further "tribal economic development." 25 U.S.C. § 2702(1). That goal was not premised on anticipated gambling by Indians living nearby. It was premised on gambling by large numbers of visitors, and was based on experience with private casinos in places such as Las Vegas which, despite their location in a remote desert, have successfully attracted visitors.

governmental interest that satisfies *Central Hudson*").

Here, however, as in *Coors*, the interests the government now asserts are undermined not by geographic happenstance, but by provisions the government itself enacted. While the scheme bans broadcast advertising about private casino gaming, "it allows the exact opposite in the case of" state, local, and Indian casino gaming, betting on horse and dog races, jai alai, state lotteries, and many other gambling activities. *Coors*, 514 U.S. at 488. Moreover, the government permits even private casinos to advertise the very qualities of fantasy and excitement most likely to attract gamblers, especially compulsive gamblers. As in *Coors*, "the irrationality of this unique and puzzling regulatory framework ensures that the [ban on advertising] will fail to achieve" the government's asserted interests. *Id.* at 489.

Moreover, even if the government's scheme were *not* "pockmarked with exceptions and buffeted by countervailing state policies," Pet. App. 40a, its reliance on an "axiomatic" link between promotional advertising and demand here, Gov. Br. 34, is questionable. The government has not asserted an interest in reducing consumer demand for gambling *generally*, or even the demand for casino gambling. The interest it asserts is in reducing social costs of gambling, costs the government does not contend are evenly associated with all gambling, or with all casino gambling. Most of the social costs it identifies are associated with the 1.1% of the population, *id.* at 16, the government identifies as compulsive gamblers: addiction, harm to families, street and white collar crime. *See id.* at 18; Gov. Lodging 385-89, 401.[9] Another social cost it identifies --

[9] This alone makes clear that the ban "lacks the precision the First Amendment requires" because it substantially abridges the speech rights of the vast majority to protect the few. *Reno v. ACLU*, 117 S. Ct. 2329, 2346 (1997); *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73

gambling as a regressive tax on the poor -- is implicated only when the poor gamble, not when people of means gamble. Gov. Br. 15-16. And organized crime is implicated only if gaming operations are infiltrated by organized crime groups.

Thus, even assuming *arguendo* that the prohibited advertising would materially affect overall demand, rather than market share,[10] this is not the link the government needs to prove. The links necessarily posited here are that advertising showing specific games in private casinos, or providing information about practices such as payout percentages, will lead to material increases in compulsive gambling, gambling by the poor, and infiltration of gambling operations by organized crime. The links posited by the government here, therefore, are at least as attenuated as the link between price advertising and demand asserted in *44 Liquormart* that *no* member of this Court found "axiomatic." The publications the government cites and the materials it lodged also fall woefully short of establishing the links it posits. Instead, those materials suggest that social costs of gambling increase when gambling is *legalized*, Gov. Br. 24-

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(1983) ("the government may not reduce the adult population to reading only what is fit for children")(citation omitted); *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (same); *Roth v. United States*, 354 U.S. 476, 488-89 (1957) (rejecting as "unconstitutionally restrictive" a test for obscenity that focused on the material's effect on "the most susceptible persons" in the community). Moreover, because of its numerous exceptions, the ban here at best "provides only the most limited incremental support," even with respect to those few, and that is insufficient to justify such a ban. *Bolger*, 463 U.S. at 73.

[10]But such assumptions are exactly what this Court has found insufficient. *See, e.g., 44 Liquormart*, 517 U.S. at 531 (O'Connor, J.). Indeed, they would vitiate the third prong of the *Central Hudson* test because government could almost always identify a problem with a product or service and *assume* that its advertising restriction would advance its interests by decreasing demand.

25 -- a factor the government's prohibition does not affect.[11]

The government's final attempt to defend the statutory scheme mirrors Cincinnati's in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). The government argues that it can ban certain private casino advertising while permitting Indian and government casino advertising because private casino gaming has less social value since its revenues do not accrue directly to governmental purposes. Gov. Br. 37-38. *Cf. Discovery Network*, 507 U.S. at 428 (ban on commercial handbills but not on newspapers defended on the ground that handbills have a lower value than newspapers).[12] This argument cannot justify the ban for two reasons. First, a distinction based on who receives revenues, like the distinction rejected in *Discovery Network*, "has absolutely no bearing on the interests [the government] has asserted." *Id.*

Second, the claimed distinction is illusory. Rhode Island receives 46% of the revenues its privately-operated casino games generate. *See* <www.trackinfo.com/li/li_hist.html>. Rhode Island could achieve the same result by authorizing the same company to offer the same casino gaming, under the same conditions, and imposing a 46% gross receipts tax. Thus, contrary to the government's argument, the amount of revenues devoted to governmental purposes is not determined by who

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[11]*Cf.* American Gaming Ass'n Br. at 7-22; Nat'l Ass'n of Broadcasters, *et al.*, Br. at 5, 15-20. One government affidavit suggests state lottery addicts blame advertising for their problems, Gov. Lodging 400. But even accepting such rationalizations at face value, that "evidence" undermines the government because its scheme *permits* advertising of state lotteries.

[12] The government does not claim that revenues from gambling on horse or dog races, or jai alai, accrue directly to governments.

controls the gaming.[13] Furthermore, the federal government could itself imose a tax and provide the proceeds to states or tribes. Because the sovereigns at issue have taxing powers, no sensible distinction can be based on the ownership of gaming revenues -- even if ownership *were* related to the interests the government asserts to justify the ban.[14]

This contradictory statute makes another distinction the government does not even attempt to justify: a distinction between so-called games of skill and games of chance. Section 1304's advertising ban applies only to games of chance, not to betting on the outcome of games of "skill." Thus, the implementing agency excludes winner-take-all poker tournaments from the advertising ban on the ground that a poker *tournament* is primarily a game of skill, but applies the ban to video poker and casino poker, which it considers games of chance. *See Calnevar Broad.*, 8 F.C.C.R. at 32.[15] Wholly

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[13] Nor does it follow that a governmental entity would receive more revenues if it operated the casino gaming directly, as long experience with government outsourcing has proven. Private companies often perform functions so much more effectively than government that they can provide a better financial result for the government, and still keep a portion as profit.

[14] In addition, the statute's incentive to governments to provide casino gaming themselves (so it can be advertised) instead of strictly regulating and taxing private casinos, is especially peculiar if the government is concerned that permitting advertising implies endorsement because, if true, advertising by *governments* necessarily sends an even stronger message of endorsement.

[15] The scheme also expressly permits advertising involving "bets or wagers on sporting events or contests," 18 U.S.C. § 1307(d), *see also* 47 C.F.R. § 73.1211(d)(1). A separate provision now prohibits operation and advertising of gambling on certain sporting events. 28 U.S.C. § 3702. But sports gambling not unlawful under that provision, *e.g.*, betting on horse races, jai alai, and certain grandfathered sports betting, may be advertised notwithstanding § 1304's ban because these are considered games of skill.

apart from whether this makes any sense as a definitional matter, the distinction between these types of gambling bears no relationship to the interests the government asserts to defend the ban. Absent any connection between the government's asserted interests and critical distinctions drawn by its regulatory scheme, it is clear the government has not, and cannot, establish "the 'fit' between its goals and its chosen means that is required." *Discovery Network*, 507 U.S. at 428.

B. The Government Could Use Any of Numerous More Effective Non-Speech Alternatives.

The regulatory scheme also runs afoul of this Court's clear directive that governments may not restrict speech when direct regulation would be effective. *44 Liquormart*, 517 U.S. at 530 (O'Connor, J.); *Coors*, 514 U.S. at 491. Here, the government has a choice of direct regulations that would *more* effectively reduce any social costs of private casino gambling and assist states that prohibit private casino gambling, than does the advertising ban. The government itself asserts it has the power to directly regulate casino gambling. Gov. Br. 22-23. Thus, it could, for example, prohibit private casinos. Based on its own "evidence" linking increased compulsive gambling to expanded *availability* of legalized gambling, reducing that availability should be its first choice for reducing compulsive gambling. *Id.* at 17. Unlike Puerto Rico, which claimed an interest in *Posadas* in exploiting visitors while shielding its own residents, the federal government has not asserted any interest in keeping *private* casinos open.

Regulating the conduct, rather than the speech, is not impractical; it is precisely the approach the government has taken with respect to sports betting. Betting on sports events and athletic performances that are considered harmful may not be authorized, licensed, operated, sponsored, or advertised. 28 U.S.C. § 3702. The government has not suggested that its

experience with prohibiting sports betting casts doubt on the effectiveness of direct regulation of private casino gaming. And its allusion to prohibitions that led to black markets and enforcement burdens, Gov. Br. 46, fails to acknowledge that the prohibition at issue would be of private casino gaming only, not a complete prohibition of gambling. As the government itself recognizes: "the widespread growth of legalized gambling throughout the country in recent years acts as a strong counter-force to illegal gambling by providing alternative, legal opportunities for gambling." *Broadcast*, 56 Rad. Reg. 2d at 984. Moreover, it would be even easier to enforce a ban on private casino gambling than a ban on sports betting, a ban Congress has already determined presents no untoward enforcement difficulties.[16]

There are many other non-speech regulations that could more effectively reduce the asserted social costs of private casino gambling. The government could impose play or credit limits, or prohibit credit altogether, or impose admission controls or a substantial admission charge to discourage those without considerable discretionary income from pursuing this type of entertainment. The amount each person could gamble could be limited, either by an absolute maximum per player or based on income. This could be enforced by requiring bets to be made with pre-paid cards and cards to be obtained from the government. In other words, as the principal opinion in *44 Liquormart* recognized, "[p]er capita purchases could be limited as is the case with prescription drugs." 517 U.S. at 507.

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[16] The government's professed concern that banning private casino gambling would impinge on state authority, Gov. Br. 46, is hypocritical. The *current* scheme impinges on state authority by imposing its ban in states that encourage private casinos as a means of attracting tourists and raising tax revenues, such as Louisiana. *Players Int'l*, 988 F. Supp. at 503.

Interestingly, the government's own "evidence" suggests several Indian tribes have been successful in curbing compulsive gambling through similar measures. Gov. Lodging 294-95 (measures include prohibiting betting on credit or borrowing, limiting gambling to surplus property, and placing limits on the amount bet). In any event, the government itself claims that the far less strict federal regulations currently imposed on Indian casinos, in combination with location, reduce social costs to an acceptable level. Gov. Br. 37.

C. Remand Would Serve No Purpose Here.

The government's plea for yet another chance to defend this statutory scheme should be rejected. No amount of evidence can untangle the scheme's inherently contradictory provisions, and certainly not the materials on which the government rests its request for remand.[17] The regulatory scheme's own provisions undermine the government's asserted goals in every imaginable manner, or bear no relationship to those goals whatsoever. Numerous non-speech alternatives would serve the government's asserted interests at least as well, if not far better. Remand would therefore serve no purpose.

Nor has the government been caught unawares by a change in the law after its evidentiary record was already established, as it claims. Gov. Br. 49. The government had an adequate opportunity on remand, after *44 Liquormart*, to move to

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[17] The lodged material the government claims justifies the statutory scheme is aimed almost entirely at supporting the substantiality of the government's interests. Much of it *contradicts* the government's assertions with respect to the more difficult third and fourth prongs of the *Central Hudson* test, as discussed above. And that evidence failed to satisfy the court to which it was submitted. *See Players Int'l*, 988 F. Supp. at 506-07 (finding "no evidentiary support" that the ban "will significantly reduce gambling addiction or violence," and finding the ban "more extensive than necessary").

supplement the record before the Court of Appeals or to remand for a further evidentiary proceeding. It did neither.

II. GOVERNMENT-ENFORCED IGNORANCE IS PRESUMPTIVELY UNCONSTITUTIONAL.

The decision below, relying heavily on the language and rationale of *Posadas*, illustrates the need for a rule stating clearly that government may not ban commercial speech based on the assumption that people cannot be trusted with truthful information about lawful activities. The restriction challenged here seeks to manipulate the choices of potential consumers by denying them information about entirely lawful leisure activities. To that end, it deprives them of useful facts, such as payout percentages, that would help them make economically rational choices among casinos. It also discourages "price" competition and innovations by private casinos that could benefit consumers, by prohibiting advertising of those benefits. Further, it hides the government's policy from public view. *See 44 Liquormart*, 517 U.S. at 509 (Stevens, J.) (noting that *Posadas*' "advertising ban served to shield the State's anti-gambling policy from the public scrutiny that more direct, non-speech regulation would draw").

It has been increasingly recognized by this Court that enforced ignorance is antithetical to the First Amendment principles that require protection of commercial speech in the first place. The government simply has no legitimate basis for regulating in order to "keep would-be recipients of the speech in the dark." *44 Liquormart*, 517 U.S. at 523 (Thomas, J., concurring); *see also id.* at 503 (Stevens, J.) (noting that such bans "usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth"); *cf. id.* at 517 (Scalia, J., concurring) (sharing the "aversion towards paternalistic governmental policies that prevent men and women from hearing facts that might not be good for them").

In this Court's first full discussion of the First Amendment's protection of commercial speech, it held that "the First Amendment makes for us" the choice between the "paternalistic" approach of protecting people from speech, and the assumption that "information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976). Since *Virginia Pharmacy*, this Court has repeatedly held unconstitutional speech restrictions that "rest[] in large measure on the advantages of [citizens'] being kept in ignorance." *Id.* at 769-70. *See, e.g., Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85, 96-97 (1977) (rejecting signage prohibition premised on fear that "disclosure would cause the recipients of the information to act 'irrationally'"); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 375 (1977) ("we view as dubious any justification that is based on the benefits of public ignorance"). Indeed, the only case in which the Court upheld a restriction adopted to keep the public ignorant about lawful activities is *Posadas*, a decision that has already been effectively abandoned by this Court.[18]

This Court should unambiguously reaffirm that *Virginia Pharmacy* correctly rejected government justifications resting on the premise that it is legitimate to keep citizens ignorant of lawful options. Such a ruling is needed to prevent the mischief

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[18] *See Coors*, 514 U.S. at 482 n.2 (rejecting *Posadas*' "vice" and "greater includes the lesser" rationales); *44 Liquormart*, 517 U.S. at 509 ("*Posadas* erroneously performed the First Amendment analysis") (Stevens, J.); *id.* at 531 (noting *Posadas*' deferential approach has not been followed in subsequent case law) (O'Connor, J.). *Edge*, unlike *Posadas*, involved advertising of an activity that was illegal in the state where it would have been advertised. 509 U.S. at 423.

encouraged by the lingering specter of *Posadas*, pointedly illustrated by the decision below. Government restrictions on the flow of accurate information to the public should be deemed inconsistent with the First Amendment's premise that more information is preferable to less, and that liberty is threatened when government decides what information is available to its citizens. *See, e.g., Edenfield v. Fane*, 507 U.S. 761, 767 (1993) ("the general rule is that the speaker and the audience, not the government, assess the value of the information presented."). The advertising ban at issue provides an appropriate vehicle for this Court to make clear that the First Amendment presumptively precludes laws that advance government interests by enforcing ignorance.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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